

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff.

COURTLAND M. GETTEL,

Defendant.

CASE NO. 16cr1099 WQH
CASE NO. 17cv2271 WQH

ORDER

HAYES, Judge:

This matters before the Court are the motions pursuant to 28 U.S.C. § 2255 filed by Defendant (ECF No. 154, 156) and the motion to dismiss for lack of jurisdiction filed by Plaintiff United States (ECF No. 170).

FACTS

On October 17, 2017 this Court sentenced Defendant to serve a sentence of 135 months in custody for wire fraud conspiracy in violation of 18 U.S.C. § 1349. (ECF No. 167).¹

On October 30, 2017, Defendant filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. (ECF No. 150). Defendant's appeal remains pending.

On November 06, 2017, Defendant filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, (ECF No. 154). Defendant moves the Court to vacate his sentence

¹ On January 12, 2018, the Court entered an Amended Judgment in a criminal case adding restitution. (ECF No. 167).

1 based a claim that he did not fully understand the consequences of his plea and a claim
2 of conflict of interest of his defense counsel.

3 On November 14, 2017, Defendant filed a second motion to vacate his sentence
4 pursuant to 28 U.S.C. § 2255. (ECF No. 156).

5 On February 20, 2018, the Plaintiff United States filed a response to the
6 Defendant's motions and a motion to dismiss on the ground that a direct appeal is
7 pending and the Defendant cannot proceed in two court.

8 RULING OF THE COURT

9 Generally, “[a] district court should not entertain a habeas corpus petition while
10 there is an appeal pending.” *Feldman v. Henman*, 815 F.2d 1318, 1320 (9th Cir. 1987).
11 Only when the defendant proves the existence of ““extraordinary circumstances”
12 [which] outweigh the considerations of administrative convenience and judicial
13 economy” should a district court consider a § 2255 motion during the pendency of a
14 direct appeal. *United States v. Taylor*, 648 F.2d 565, 572 (9th Cir. 1981) (court found
15 that the circumstances were extraordinary because the collateral attack alleged newly
16 discovered facts that “[cast] such a dark shadow on a pivotal aspect of the direct appeal
17 ... [and] that the concerns for justice are best served by prompt inquiry either confirming
18 or dispelling the suspicion of irregularity raised”). A pending direct appeal “severely
19 restricts the filing of a collateral claim with the District Court, to avoid any anomaly
20 associated with the simultaneous consideration of the same case by two courts.” *Id.* In
21 some instances, the result of the direct appeal will render the collateral claim moot. *See*
22 *id.*

23 In this case, Defendant filed a Notice of Appeal thirteen days after the sentencing
24 and a § 2255 motion a week later. Defendant seeks to proceed in two courts to
25 challenge the same judgment. The § 2255 motion challenges the legality of the same
26 sentence currently on appeal to the Court of Appeals for the Ninth Circuit. The
27 circumstances of this case are not extraordinary and this Court will not entertain
28 Defendant’s § 2255 motion during the pendency of his direct appeal.

1 IT IS HEREBY ORDERED that motions pursuant to 28 U.S.C. § 2255 filed by
2 Defendant (ECF No. 154, 156) are denied without prejudice to re-file as provided in 28
3 U.S.C. § 2255(f).

4 IT IS FURTHER ORDERED that the motion to dismiss for lack of jurisdiction
5 filed by Plaintiff United States (ECF No. 170) is granted.

6 The Clerk of the Court shall provide this Order to the Defendant at 60857298
7 USP Victorville, P.O. Box 3900, Adelanto, CA 92301.

8 DATED: May 3, 2018

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10 **WILLIAM Q. HAYES**
11 United States District Judge

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